Petition

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

81-1805

NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FLANN P. MAGUIRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

IRWIN M. ZALKIN, Esq.
Law Offices of Edenbaum & Zalkin
SHELDON SHERMAN, Esq.
Pancer & Sherman
225 Broadway, Suite 900
San Diego, CA. 92101
(714) 235-4389

Attorneys for Petitioner

Dean-Standefer, 1340 West Sixth St., Corona, California 91720 - (714) 734-0811

QUESTION PRESENTED

Whether the intentional or reckless failure by Narcotics Task Force Officer Berstler to provide material and relevant information to the magistrate, to allow a neutral and informed determination of probable cause to search the premises of 1137 Woodlake Drive, in Cardiff-by-the-Sea, California, must result in the invalidation of the search warrant?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities Cited	iii
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons For Granting The Writ	5
The decision of the Court of Appeals for the Ninth Circuit impairs the constitutional significance of *Franks v. Delaware*, 438 U.S. 154 (1978), and its progeny, and is inconsistent with the holding of the Eighth Circuit in *United States v. Stratton*, 453 F.2d 36 (8th Cir. 1972), that knowledge of one agent involved in the investigation will be deemed to be within the knowledge of all agents so involved	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases	Page
Franks v. Delaware, 438 U.S. 154 (1978)	5, 6, 7
United States v. Stratton, 453 F.2d 36 (8th Cir. 1979)	5, 7
United States v. Ventresca, 380 U.S. 102 (1965)	5
United States Constitution	
Fourth Amendment	2, 3, 6
Statutes	
Title 21, United States Code § 841(a)	2
§ 846	2
Title 28, United States Code § 1254(1)	2

NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FLANN P. MAGUIRE,[1]

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Flann Patrick Maguire, respectfully prays that a writ of certiorari issue to review that judgment of the United States Court of Appeals for the Ninth Circuit entered on September 4, 1981.

---

[1]The other defendants involved in this matter are BRENT E. BOWMAN and LOUISE R. HALEY.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit entered its Memorandum affirming the conviction of petitioner on September 4, 1981. On November 12, 1981, a petition for rehearing was denied and suggestion for rehearing en banc rejected. A copy of the Memorandum decision, which is not to be reported officially, is attached hereto as Appendix "A" (appendix pages 1 - 3). A copy of the order denying the petition for rehearing and rejecting the suggestion for rehearing en banc is attached hereto as Appendix "B" (appendix pages 4 and 5).

JURISDICTION

On September 4, 1981, the United States Court of Appeals for the Ninth Circuit entered judgment affirming the conviction of petitioner for conspiring to possess a controlled substance and the possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a). A petition for rehearing and suggestion for rehearing en banc was denied and rejected on November 12, 1981. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects against

unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation . . . . "

STATEMENT OF THE CASE

On April 16, 1980, at approximately four or five o'clock that afternoon, the United States magistrate issued a warrant allowing for the search of the premises known as 1137 Woodlake Drive, in Cardiff-by-the-Sea, California, the residence of co-defendant Brent E. Bowman (R.T. 226)[2]. The warrant was issued upon the affidavit of Special Agent Brian L. Cook of the Drug Enforcement Agency.

Portions of the information provided in the Affidavit of Agent Cook were obtained by Cook from Agent Berstler of the Narcotics Task Force (R.T. 196; 198; 222 - 223; 225 - 226; 228 - 229).

On April 16, at approximately 10:15 a.m., the morning of the day the warrant was issued, Agent Berstler spoke with co-defendant Tina (Louise R.) Haley on the telephone. Haley related to Agent Berstler that the cocaine (the subject matter of the search) was "two blocks" from Haley's connection's house. (R.T. 200; C.R. 30; E.C.R. 40 - 41.) Approximately fifteen minutes later, Agent Berstler was told by Haley that the cocaine was "three minutes from his [the connection's]

---

[2]"R.T." refers to the Reporter's Transcript, and as used hereafter, "C.R." refers to the Clerk's Record on appeal and "E.C.R." to excerpt from the Clerk's Record.

house" (C.R. 30; E.C.R. 42). Agent Berstler was aware that "three minutes from his house" was in reference to co-defendant Bowman's house (R.T. 201).

Agent Berstler had these telephone conversations with Haley from the Narcotics Task Force office. Agent Berstler continued working on the case, "preparing for that evening" (R.T. 196; 203).

Approximately two hours after the conversations with Tina Haley, Agent Berstler met Agent Cook at the Narcotics Task Force office. Agent Cook informed Agent Berstler that he was going to the United States Attorney's office to obtain a search warrant for 1137 Woodlake, Bowman's residence. (R.T. 198.) Agent Berstler withheld the information obtained from Haley that the cocaine was not at the Bowman residence but "two blocks" and "three minutes" away from the residence.

Later that afternoon, Agent Cook called Agent Berstler from the United States Attorney's office, advised Berstler that he was still attempting to get the search warrant, and asked if there were any further developments in the case. Agent Berstler indicated that the "case was still going to go"; however, he made no mention of his conversations with Haley. (R.T. 222 - 223; 225 - 226; 228 - 229.)

The warrant for the search of the Bowman residence was issued between four and five o'clock that afternoon (R.T. 226). The United States magistrate was never informed of the conversations between Agent Berstler and Haley approximately seven hours earlier. According to Berstler, who has participated in the procurement of over one hundred search warrants, this information was not transmitted to the magistrate because he (Berstler) "was in quite a hurry that

day . . . I had a lot of things on my mind. I didn't tell [Agent Cook] anything because I felt that if he could obtain the search warrant, he could obtain the search warrant" (R.T. 200; 204).

After the warrant was issued, Agent Berstler continued negotiations with Haley. Berstler arranged, through Haley, for the cocaine to be moved to the residence at 1137 Woodlake. At 8:17 p.m., after Agent Berstler "knew that everything was ready to go," *i.e.*, that the cocaine was at the residence (R.T. 214), the warrant was executed.

The United States Court of Appeals for the Ninth Circuit did not remand the case to the lower court to quash the search warrant and suppress the evidence seized at the 1137 Woodlake residence.

REASONS FOR GRANTING THE WRIT

The Decision Of The Court Of Appeals For The Ninth Circuit Impairs The Constitutional Significance Of *Franks v. Delaware*, 438 U.S. 154 (1978) And Its Progeny, And Is Inconsistent With The Holding Of The Eighth Circuit In *United States v. Stratton*, 453 F.2d 36 (8th Cir. 1972) That Knowledge Of One Agent Involved In The Investigation Will Be Deemed To Be Within The Knowledge Of All Agents So Involved.

An issuing magistrate must be provided with full and sufficient information in order to make a neutral and objective judicial determination regarding probable cause. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). It has already

been held by this Court, in *Franks v. Delaware*, 438 U.S. 154 (1978), that false statements intentionally or recklessly included in warrant affidavits may cause any warrant issued thereunder to be held void. The warrants are held void when, but for the affirmative falsehood, there is not enough information for a determination that probable cause exists. Of paramount importance to the preservation of Fourth Amendment rights is that an issuing magistrate be able to base his probable cause determination for the issuance of a warrant on a truthfully relayed set of all facts and circumstances available that would tend toward a finding of probable cause. *Franks v. Delaware, supra.*

In our cause, the warrant affidavit set forth a set of facts and circumstances upon which the magistrate determined that probable cause did exist to believe that cocaine was at the premises of 1137 Woodlake. The warrant affidavit was presented to the magistrate by Agent Cook, who received much of its contents from Agent Berstler. Agent Berstler was experienced in seeking warrants and stated that he had participated in the procurement of over 100 search warrants. (R.T. 200; 204.) Therefore, Agent Berstler knew that, by law, the magistrate was required to consider all facts and circumstances in the warrant affidavit and determine whether probable cause existed to reasonably believe that cocaine would be found at the residence.

Agent Berstler must have been aware that if the magistrate were informed by Agent Cook that the cocaine was not on the premises for which the search warrant was sought, probable cause to search the premises would not exist. Had the magistrate been informed that, as a matter of fact, the cocaine was absent from the premises, there would have been

no cause to believe that it might have been there at the time the warrant was sought. Thus, the magistrate was deceived and denied the opportunity of making a neutral and informed decision, since essential facts were not presented to him. To sanction the withholding of material information, either inadvertently or otherwise, is to make a mockery of the rationale of *Franks v. Delaware.*

As stated by the Eighth Circuit Court of Appeals:

> "We think the knowledge of one officer is the knowledge of all and that in the operation of an investigation or police agency the collective knowledge and the available objective facts are the criterion to be used in assessing probable cause . . . . The officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all."
>
> *United States v. Stratton,* 453 F.2d 36, at 37.

Under the facts of this case, the failure by Agent Berstler to disclose the information to Agent Cook should be deemed a reckless disregard, or the information not disclosed should be deemed within the collective knowledge of all agents, including Agent Cook, who provided the affidavit upon which the search warrant was issued.

CONCLUSION

For the foregoing reasons, petitioner, Flann P. Maguire, respectfully prays that a writ of certiorari issue to review the

ruling of the United States Court of Appeals for the Ninth Circuit to resolve the issues presented herein.

Respectfully submitted,

IRWIN M. ZALKIN

and

SHELDON SHERMAN

Attorneys for Petitioner

INDEX TO APPENDIXES

		Page
"A"	Memorandum decision filed September 4, 1981, in the United States Court of Appeals for the Ninth Circuit	1
"B"	Order denying petition for rehearing and rejecting suggestion for rehearing en banc filed November 12, 1981, in the United States Court of Appeals for the Ninth Circuit	4

APPENDIX "A"

MEMORANDUM DECISION

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRENT E. BOWMAN, Defendant-Appellant.
No. 80-1809 - D.C. No. CR 80-262-3.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUISE R. HALEY, Defendant-Appellant.
No. 80-1814 - D.C. No. CR 80-262-1.

UNITED STATES OF AMERICA' Plaintiff-Appellee, v. FLANN P. MAGUIRE, Defendant-Appellant.
No. 80-1815 - D.C. No. CR 80-262-2.

[Filed September 4, 1981]

On Appeal from the United States District Court for the Southern District of California.
The Honorable Gordon Thompson, Jr., District Judge, Presiding.
Argued and submitted August 5, 1981.

Before: ANDERSON and CHAMBERS, Circuit Judges, and BILBY,* District Judge.

---

*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

SUFFICIENCY OF THE AFFIDAVIT

Appellants have challenged the sufficiency of the affidavit relied upon for issuance of the search warrant. They argue that material information was intentionally or recklessly withheld which, if included, would have destroyed probable cause. The district court found that the information was not intentionally or recklessly omitted. We have reviewed the record and do not find the district court's determination on this issue to have been clearly erroneous. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir.), *cert. denied*, ... U.S. ..... , 101 S. Ct. 86, 66 L. Ed. 2d 27 (1980); *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir. 1976).

Appellant Bowman also argues that information contained in paragraph 12 of the affidavit, regarding his prior arrest in Texas, should have been deleted because the arrest was based upon illegally-seized evidence. He further contends that without this information the affidavit would not have established probable cause. Where, as here, the district court made no specific finding on this issue, we will uphold the district court's denial of appellant's motion to suppress if a reasonable view of the evidence will sustain it. *United States v. Miner*, 484 F.2d 1075, 1077 (9th Cir. 1973). Since the affidavit contained sufficient independently derived information apart from paragraph 12, we find ample support for the district court's denial of the motion to suppress.[1]

[1]We express no view as to the legality of Bowman's prior Texas arrest.

COMPLIANCE WITH 18 U.S.C. § 3109

Appellants contend that the knock and announcement requirements of 18 U.S.C. § 3109 were violated by the officers' entries at the front and side doors of the unit searched. The district court found that the officers who entered at the front door properly knocked and announced their authority and purpose as required. The district court further found that exigent circumstances justified the side door entry. The findings of the district court on these issues are not clearly erroneous. *United States v. Flickinger*, 573 F.2d 1349, 1357 (9th Cir.), *cert. denied*, 439 U.S. 836, 99 S. Ct. 119, 58 L. Ed. 2d 132 (1978); *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir. 1976).

Because of the above dispositions, it is unnecessary for us to reach the issue of standing to challenge the legality of the search as raised by the parties to this appeal.

We have considered all other contentions raised by appellants and find them to be without merit.

AFFIRMED.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRENT E. BOWMAN, Defendant-Appellant.
No. 80-1809 - D.C. No. CR 80-262-3.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUISE R. HALEY, Defendant-Appellant.
No. 80-1814 - D.C. No. CR 80-262-1.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FLANN P. MAGUIRE, Defendant-Appellant.
No. 80-1815 - D.C. No. CR 80-262-2.

[Filed November 12, 1981]

Before: ANDERSON and CHAMBERS, Circuit Judges, and BILBY,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested

---

*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Riverside, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on JANUARY , 1982, I served the within PETITION FOR WRIT OF CERTIORARI (MAGUIRE v. UNITED STATES) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
U. S. Courthouse, Rm. 5-N-19
San Diego, California 92189 (3 copies)

SOLICITOR GENERAL of the UNITED STATES
U. S. DEPARTMENT OF JUSTICE
Washington, D. C. 20530 (3 copies)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
940 Front Street
San Diego, Ca. 92189 (1 copy)
Ref: D.C. No. CR 80-262-2

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1982, at CORONA, CALIFORNIA.

D. A. Standefer

Orig. & 40 Copies to U. S. Supreme Court, U. S. Supreme Court Bldg.,
Washington, D. C. 20543 - Check 1501 - $200 attached to Orig.

Dean-Standefer, 1340 W. Sixth St., Corona, Ca. 91720
(714) 734-0811